1   KEKER & VAN NEST LLP   KING & SPALDING LLP
     ROBERT A. VAN NEST - # 84065   DONALD F. ZIMMER, JR. - #112279
2   rvannest@kvn.com   fzimmer@kslaw.com
     CHRISTA M. ANDERSON - # 184325   CHERYL A. SABNIS - #224323
3   canderson@kvn.com   csabnis@kslaw.com
     DANIEL PURCELL - # 191424   101 Second Street, Suite 2300
4   dpurcell@kvn.com   San Francisco, CA 94105
     633 Battery Street   Tel: 415.318.1200
5   San Francisco, CA 94111-1809   Fax: 415.318.1300
     Telephone: 415 391 5400
6   Facsimile: 415 397 7188

7   KING & SPALDING LLP   GREENBERG TRAURIG, LLP
     SCOTT T. WEINGAERTNER   IAN C. BALLON - #141819
8   (*Pro Hac Vice*)   ballon@gtlaw.com
     sweingaertner@kslaw.com   HEATHER MEEKER - #172148
9   ROBERT F. PERRY   meekerh@gtlaw.com
     rperry@kslaw.com   1900 University Avenue
10   BRUCE W. BABER (Pro Hac Vice)   East Palo Alto, CA 94303
     1185 Avenue of the Americas   Tel: 650.328.8500
11   New York, NY 10036   Fax: 650.328.8508
     Tel: 212.556.2100
12   Fax: 212.556.2222

13
     Attorneys for Defendant
14   GOOGLE INC.

15   UNITED STATES DISTRICT COURT

16   NORTHERN DISTRICT OF CALIFORNIA

17   SAN FRANCISCO DIVISION

18   ORACLE AMERICA, INC.,   Case No. 3:10-cv-03561 WHA

19   Plaintiff,   **GOOGLE INC.'S NOTICE OF MOTION,
                                              MOTION, AND MEMORANDUM OF
20   v.   POINTS AND AUTHORITIES IN
                                              SUPPORT OF MOTION FOR SUMMARY
21   GOOGLE INC.,   JUDGMENT RE COPYRIGHT
                                              DAMAGES**
22   Defendant.
                                              Dept.:   Courtroom 8, 19th Floor
23   Judge: Hon. William Alsup

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

2   PLEASE TAKE NOTICE that Defendant Google Inc. ("Google") hereby moves for

3 summary judgment that Oracle America, Inc. ("Oracle") cannot recover any of Google's profits

4 based on infringement of Oracle's copyrights in a file called Arrays.java, from which Google

5 copied a nine-line method called rangeCheck, and eight decompiled test files. This Motion is

6 based on the following memorandum of points and authorities in support, the Declaration of

7 David Zimmer ("Zimmer Decl.") in support of this motion and accompanying exhibits, the entire

8 record in this matter, and on such evidence as may be presented at any hearing of this Motion, on

9 a date and at a time to be determined by the Court. The parties have met and conferred regarding

10 this Motion, and have agreed that Oracle will file an Opposition by 10:00 PM on Sunday, May

11 13, and that Google will waive its right to a Reply.

12

13 Dated: May 12, 2012   KEKER & VAN NEST LLP

14   By: s/ Robert A. Van Nest_____
                                                          ROBERT A. VAN NEST

15   Attorneys for Defendant
16   GOOGLE INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.   INTRODUCTION

This Court should grant summary judgment for Google on Oracle's right to recover any of Google's profits based on infringement of Oracle's copyrights in (1) a 3,000-line file called Arrays.java, from which Google copied a nine-line method called rangeCheck; and (2) eight decompiled test files, which were copied by a third-party contractor called Noser in violation of Noser's contract with Google and unwittingly used by Google (and which never actually appeared on any Android phone). Oracle has no evidence, and cannot possibly prove, that Google earned *any* revenue causally linked to either the nine lines of rangeCheck or the eight superfluous test files.

Oracle's only possible argument for disgorgement is legally baseless. Oracle has argued, and will argue in response to this motion, that all it needs to do is offer the amount of Google's gross revenue for Android, at which point it can sit back and relax as the burden shifts to Google to prove its deductible costs and the portion of its Android profits not attributable to the nine lines and eight files. This fundamentally misunderstands how copyright damages work. Before the burden shifts to Google, Oracle must prove an amount of gross revenue that is causally linked to the infringing work—which is the two Android files containing rangeCheck and the eight test files, not all of Android. The Android platform contains over 15,000,000 lines of code, including 168 API packages, a virtual machine, an applications framework, and numerous applications. Settled Ninth Circuit law makes clear Oracle cannot just wave its hands at a gross revenue number for the entire platform without showing how the *infringed files* contributed to the adoption of that platform or the sale of Android phones.

Oracle has no such evidence and no witness on its witness list who could be competent to offer it anyway. After Oracle's damages expert failed to analyze literal-copying damages in either of his first two reports, the Court barred him from offering such testimony at trial. Jan. 9, 2012 Order [Dkt. 685] at 10. Oracle's counsel even admitted in Court just yesterday that it had no expert testimony that could prove a causal link. RT 3788:25-3789:1 (Boies). Neither does it

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1   have any fact testimony to offer; it has no witness on its list who could speak to the issue of how

2   the infringing files caused Google to make money from Android. And the trial record to date is

3   replete with evidence showing those files did not generate any revenue. First, the rangeCheck

4   method makes up an almost imperceptible fraction of the 15 million lines of code in the Android

5   platform—less than .00006%, or *six ten-millionths,* of Android's total content. The evidence in

6   the trial record shows that the method is trivial and could be written by a good high-school

7   programmer, was not even in Android when it was launched, and has not been in Android for

8   over a year now. Second, the eight test files are likewise trivial—they never even appeared on

9   any Android phone, the devices that generated every penny of the revenue Oracle wants to claim.

10   It is inconceivable that any of these files contributed even a penny to Android's profits.

The Court has reacted skeptically to Oracle's disgorgement claim, commenting at various

12   times that the claim "borders on the ridiculous," "would be way out there," and is "the height of

13   ridiculousness." RT 2892:13, 23-24, 3720:20-22. It is. Consistently throughout this case, Oracle

14   has tried to peg its damages claims to "Android" generally, rather than any incremental benefits

15   to Google of the specific, limited infringing technology. But copyright law, favorable though it

16   might be to a plaintiff seeking an infringer's profits, forecloses that strategy without some proof

17   of a causal link. There is and could be no such proof here. The Court should grant summary

18   judgment on the issue for Google.

19   **II.   ARGUMENT**

20   **A.   As a matter of law, Oracle could be entitled to a disgorgement remedy based on
           rangeCheck or the decompiled files only if it could first prove a causal link between
21   the infringing files and some amount of Google's gross revenue.**

22   Oracle has no right to disgorgement of Google's profits based on Google's infringement

23   of rangeCheck because it has no evidence that Google made any revenue attributable *to the*

24   *copyrighted work that was found infringed. See* 17 U.S.C. § 504(b). Oracle has always tried to

25   maximize its damages by presenting this case as an epic struggle between its entire Java platform

26   and Google's whole Android platform, but the Court has always—rightly—rejected that effort

27   and directed Oracle to focus on the specific intellectual property and alleged infringing features at

28   issue. Just before opening statements, the Court reiterated this basic point:

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> But, Mr. Jacobs, you must remember. I'm going to say to the jury many times in this case: ***The issue is not Java. It's not Android.*** It's very specific parts about Java that are protected, if at all, by copyrights or patents and very specific parts of Android that are accused. So if we start getting off onto this is Java versus Android, the judge is going to intervene and say it's not.

RT 21:21-22:2 (emphasis added); *see also* July 22, 2011 Order Granting in Part Motion to Strike First Cockburn Report [Dkt. 230] at 5-6 (rejecting damages analysis based on purported harm to all of Java from the entirety of Android).

The jury did not find that Google's Android platform infringed Oracle's Java platform. It found only that two Android files, TimSort and ComparableTimSort, infringed a single Java file called Arrays.java based on the nine-line rangeCheck method. The Court subsequently found as a matter of law, May 11, 2012 Order [Dkt. 1123], that eight Android test files also infringed eight Java files. In other words, the infringing works here are ten files out of many tens of thousands in the 15,000,000-line Android platform. *See* Final Charge to the Jury (Phase One) [Dkt. 1018] ¶ 29, at 15 ("For purposes of Question No. 3, the "work as a whole" is the compilable code for the individual file except for the last two files listed in Question No. 3, in which case the "work as a whole" is the compilable code and all the English-language comments in the same file."); Special Verdict Form [Dkt. 1018] at Question 3(a) (calling for verdict on infringement by TimSort files).

It was Oracle that asked, over Google's objection, for the jury instructions that led to the specific findings of file-to-file copying. RT 2414:20-2418:13 (Charging Conference). The Court overruled Google's objection and gave Oracle the instruction it requested. *Id.* Oracle undoubtedly wanted a charge that defined the "work as a whole" narrowly—as individual Java files, not the entire Java platform—in order to increase its chances of an infringement verdict on its literal copying claims and decrease the chances that the copied materials would be found to be *de minimis* in the vastness of the Java platform. Oracle got what it wanted, but now it must live with the consequences for damages purposes.

The expressly limited scope of the jury's verdict means we are no longer talking generally about Google's "Android revenues" with respect to wrongful profits. Oracle must prove that Google made an identifiable amount of revenue ***from the infringing work***—the two Android files containing the rangeCheck method and the eight test files. The Ninth Circuit has laid out this

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1   standard repeatedly, explaining that an infringer may not just point to a gross revenue number that

2   is not sufficiently closely linked to the infringing item. Most recently, in *Polar Bear Prods., Inc.*

3   *v. Timex Corp.,* 384 F.3d 700, 710-12 (9th Cir. 2004), the Ninth Circuit explained that,

4   "[a]lthough the statute references only the broad term 'gross revenue,' to conclude that a

5   copyright plaintiff need only provide the company's overall gross revenue, without regard to the

6   infringement, would make little practical or legal sense." *Id.* at 711. Instead, "the causation

7   element of the statute serves as a logical parameter to the range of gross profits a copyright

8   plaintiff may seek." *Id.* "The standard is straightforward: a copyright plaintiff is bound to no

9   more and no less than its statutory obligation to demonstrate a causal nexus between the

10   infringement and the profits sought." *Id.* at 712. Even where an infringer "derived some

11   quantum of profits from the infringement because its infringement was part of" a larger part of its

12   business, "it nevertheless remains the duty of the copyright plaintiff to establish ***a causal***

13   ***connection between the infringement and the gross revenue reasonably associated with the***

14   ***infringement.***" *Id.* at 715 (citing *On Davis v. The Gap, Inc.,* 246 F.3d 152, 160 (2d Cir. 2001))

15   (emphasis added). "Only then would [the infringer] bear the responsibility for apportioning

16   profits." *Id.* This is the law in other circuits too. As Judge Posner wrote nearly thirty years ago,

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> It was not enough to show [defendant's] gross revenues from the sale of
> everything he sold, which is all, really, that [plaintiff] did. If General Motors

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> were to steal your copyright and put it in a sales brochure, you could not just put a
> copy of General Motors' corporate income tax return in the record and rest your

19
> case for an award of infringer's profits.

20   *Taylor v. Meirick,* 712 F.2d 1112, 1122 (7th Cir. 1983). In other words, Oracle is seeking to shift

21   the burden too soon. Before Google has to make any showing, Oracle first must prove up not

22   Google's gross revenue generally, or even Google's gross revenue from the Android platform as a

23   whole, but an identifiable amount of gross revenue that is causally linked to the infringement.

24   *Polar Bear* only repeated what the Ninth Circuit had previously made clear. In *Mackie v.*

25   *Rieser,* 296 F.3d 909 (9th Cir. 2002), the Ninth Circuit held that, to the extent it seeks

26   disgorgement of a defendant's ***indirect*** profits, "a copyright holder must establish the existence of

27   a causal link" between the infringement and any such indirect profits. *Id.* at 914. In this context,

28   indirect profits are those resulting from "revenue that has a more attenuated nexus to the

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1   infringement" than revenue from "selling an infringing product." *Id.* Thus, in order to obtain a

2   disgorgement of Google's profits from either Android-related advertising revenue or Android-

3   related application revenue—both of which are indirect profits under *Mackie*—it must prove that

4   there is a causal link between the infringement of Arrays.java or the eight decompiled files and

5   Google's revenues. This requires a "threshold inquiry into whether there is a legally sufficient

6   causal link between the infringement and subsequent indirect profits"—exactly what Google is

7   asking the Court to conduct on this motion. *Id.* at 915. "Such an approach dovetails with

8   common sense—there must first be a demonstration that the infringing acts had an effect on

9   profits before the parties can wrangle about apportionment." *Id.* "[A] copyright holder must

10   proffer sufficient non-speculative evidence to support a causal relationship between the

11   infringement and the profits generated indirectly from such an infringement." *Id.* at 915-16.

12   Oracle has no such evidence here; it has never even tried to offer any.

13   In *Mackie,* the copyrighted work at issue was a sidewalk art installation called "The Dance

14   Steps." *Id.* at 912. The defendant Reiser had incorporated a photograph of the work into a

15   collage illustrating Seattle culture, which was then incorporated into a promotional brochure for

16   the "Pops" series of the Seattle Symphony Orchestra, which was also a defendant in the case. *Id.*

17   Among other remedies, Mackie sought disgorgement of any of the Symphony's profits allegedly

18   attributable to the promotional brochure. *Id.* at 912-13.

19   The Ninth Circuit held that Mackie had failed to carry his initial burden to establish gross

20   revenues casually connected to the Symphony's infringement:

21   Intuitively, we can surmise virtually endless permutations to account for an
             individual's decision to subscribe to the Pops series, reasons that have nothing to
22   do with the artwork in question. For example, was it because of the Symphony's
             reputation, or the conductor, or a specific musician, or the dates of the concerts, or
23   the new symphony hall, or the program, or the featured composers, or community
             boosterism, or simply a love of music, or . . . ? In the absence of concrete
24   evidence, Mackie's theory is no less speculative than our effort in this paragraph to
             enumerate even a relatively short list of the myriad factors that could influence an
25   individual's purchasing decisions.

26   *Id.* at 916. Even had Mackie been able to offer evidence tending to show that a percentage of the

27   Symphony's sales were tied to the infringing brochure, "such a rudimentary analysis cannot

28   determine how many of those individuals subscribed ***because of Rieser's work***." *Id.* at 916

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1   (emphasis in original). Because the collage that incorporated a photograph of Mackie's artwork

2   was "but one page in a multi-page brochure that advertised a series of concerts that were

3   unrelated to the artwork itself," the Ninth Circuit flatly rejected Mackie's theory as "[r]ank

4   speculation" that was legally insufficient to support a claim for indirect profits. *Id.* Oracle's

5   proof here is far more speculative than even Mackie's inadequate evidence, given that there is so

6   much more content in Android as a whole than in a single promotional brochure. If the *Mackie*

7   photo was a needle in the brochure's haystack, Android contains thousands upon thousands of

8   haystacks. The rangeCheck method is but nine lines in over 15 million lines of code for Android,

9   RT 2179:19-23 (Astrachan), and the eight test files at issue never appeared on an Android phone,

10   RT 1319:15-1320:6 (Mitchell), and thus could never have caused any consumer to purchase a

11   phone, much less to use any of the Google-hosted services (like search, advertising, and

12   applications) that actually generated Android-related revenue for Google.

13   In its last brief on this issue, Oracle's Br. in Response to Court's Questions ("Oracle Br.")

14   [Dkt. 1106] at 4-8, Oracle offered the glib and erroneous argument that, because the copied files

15   are part of Android, all it needs to do to carry its burden is point to a gross revenue number for

16   Google's Android business unit, including all revenues from advertisements, digital content, and

17   anything else. But its own lead case rejects that argument. Oracle cited *On Davis,* 246 F.3d at

18   160, for the proposition that, if a copyright owner proved infringement of a poem, it would satisfy

19   its initial burden by identifying the infringer's gross revenue from "the sale of the anthology

20   containing the infringing poem." *Id.* Fair enough. But directly after making that statement, the

21   *On Davis* Court made clear that "we do not think the plaintiff's statutory burden would be

22   discharged by submitting the publisher's gross revenue resulting from its publication of hundreds

23   of titles, including trade books, textbooks, cookbooks, etc." *Id.* The latter example is far closer to

24   what Oracle is trying to do here, but even that comparison significantly understates the vast

25   difference between nine lines of rangeCheck and the 15 million lines in the Android platform. If

26   the rangeCheck method were analogous to a poem, the "anthology" would be the 900-line

27   TimSort file; it would certainly not be Android. The larger platform includes not only 168 API

28   packages (of which rangeCheck is but one method in two class files), but an operating system, an

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1   applications framework, a virtual machine, and numerous applications. It is no mere poetry

2   anthology. It is an entire warehouse of books, videos, music, and all the necessary apparatus for

3   reading and playing all those media. *On Davis* explicitly refutes the idea that this Court could

4   simply assume a causal link between something as minute as nine lines of code and eight test files

5   and gross revenues from something as massive as Android.

6   Moreover, even leaving the quantitative problems with Oracle's case alone and focusing

7   on quality, rangeCheck is nothing like a poem in an anthology. Oracle's counsel admitted this in

8   court last week in arguing, unsuccessfully, for judgment as a matter of law on Google's fair use

9   defense: "Obviously, software is not a symphony. Software is not a poem." RT 3368:17.

10   (Jacobs). When consumers buy a poetry anthology, it is reasonable to assume they do so because

11   of the content of that anthology—and equally reasonable to infer that a single infringing poem

12   might have played some causal role in the purchase. But there is no evidence supporting the

13   argument, and it would make no sense to assume, that Google's Android-related revenues are

14   somehow connected to the presence of rangeCheck on some Android devices and eight test files

15   that never made it onto a phone. For Google to make money from Android, it is necessary but not

16   sufficient for a consumer to buy an Android phone, and there is no evidence that rangeCheck or

17   the test files caused any consumer to buy a phone. And, even if there were, Google does not

18   make money off any phone until a consumer uses that phone to conduct a Google search, tap on a

19   Google-hosted advertisement, or purchase an application from GooglePlay (formerly Android

20   Market). There is (and could be) nothing in the record to support a finding that rangeCheck plays

21   any role in enabling, or persuading a consumer to access, any service that generates revenue for

22   Google. The test files, which are not even contained on the phones consumers purchase, cannot

23   have any influence over a consumer's use of Google-hosted services. Oracle does not even have

24   evidence suggesting a *correlation* between rangeCheck and the decompiled files on the one hand

25   and Google's revenues on the other. And, of course, even establishing correlation would not

26   establish a *causal* connection between the literal copying claims and Google's revenues. *Cf.*

27   *Woodford v. Ngo,* 548 U.S. 81, 95 (2006) ("this mistakes correlation for causation"). There is no

28   causal link here.

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1   Even Oracle's damages expert, who is forbidden from offering testimony on this issue,

2   agrees that profits are recoverable only if they can be causally connected to infringing acts. Third

3   Cockburn Report (Feb. 9, 2012) at 235, ¶ 643 ("I also understand that, as with actual profits, the

4   infringing acts must have had an effect on profits"). Dr. Cockburn then explained why he

5   believed that the *APIs* "materially enhanced" Android revenues, triggering § 504(b)'s burden-

6   shifting. *Id.* at 236, ¶ 645. This makes clear that until two days ago, even Oracle recognized that

7   it was required to demonstrate a causal relationship between the infringement and the revenue

8   before being entitled to lost profits. It also makes clear that Oracle's failure to offer any expert

9   testimony—or any other testimony—on this issue was no mere oversight, but a reflection of the

10   fact that no evidence of a nexus exists.

11   **B.   Given the evidence in the record, no reasonable jury could possibly find a causal link
       between Google's use of rangeCheck or the eight test files and any Android revenues.**

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13   In a more fundamental sense, Oracle's failure of proof on Google's gross revenues related

     to the copied files is beside the point, because the argument that any of Google's Android profits
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     could possibly be the result of Google's use of that material in Android defies belief. No
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     reasonable jury could reach that conclusion. To the contrary, the record establishes that, between
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     them, rangeCheck and the test files are responsible for exactly 0.0% of Google's revenues.
17
18   **1.   The trial record shows that rangeCheck has no link to Android revenue.**

19   To begin with, as the Court noted after the jury rendered its verdict, rangeCheck makes up

20   a tiny fraction of the Android platform in a quantitative sense. It is nine lines of source code out

     of a platform that contains more than 15 million lines, RT 2179:19-23 (Astrachan), amounting to
21
     .00006% of Android. That does not qualify even as *de minimis*.
22
23   But rangeCheck is indisputably insignificant as a qualitative matter too. The testimony at

     trial, from both sides of the aisle, has been unequivocal that rangeCheck is a "very short simple
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     method" that checks three parameters of an array: the starting point, the end point, and that the
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     end point is greater than the starting point. RT 813:7-8, 815:5-9 (Bloch). Josh Bloch, who wrote
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     rangeCheck, testified that "[a]ny competent high school programmer could write" that method.
27
28   RT 815:13-16 (Bloch). Even Oracle's expert Dr. Mitchell conceded that "a good high school

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1   programmer" could write rangeCheck with guidance. RT 1316:24-25 (Mitchell).

2   In addition to being trivial to create and easily replicable by a beginner, rangeCheck offers

3   no performance benefit to Android. The rangeCheck method is nine lines out of a file called

4   TimSort. Bloch testified that TimSort is useful to Android because it makes arrays sorts much

5   faster. RT 812:19-813:3 (Bloch). But Bloch also made clear that not one bit of that performance

6   improvement is due to rangeCheck, as opposed to the other 900-plus lines of code in TimSort.

7   RT 814:1-4. In fact, rangeCheck is a "private method" that is "not part of the API." Its

8   declaration cannot be called from outside of the TimSort class, only from within that class, so it

9   cannot have an effect on any other file in Android. RT 813:12-25 (Bloch). Oracle did not cross-

10   examine Bloch on these points, much less offer evidence to contradict him.[1]

11   Moreover, rangeCheck was not even in Android when Google announced the platform in

12   November 2007 and made its code available to handset partners for inclusion on phones. Neither

13   was rangeCheck in Android when the first Android phones were released in October 2008. Bloch

14   did not even join the Android team until December 2008 or January 2009. RT 733:8-11 (Bloch).

15   He finished TimSort at some point in early 2009, at which point he contributed that file both to

16   Sun's OpenJDK project and to Android. RT 822:4-9 (Bloch). Further, rangeCheck has been out

17   of the current release of Android for about a year. RT 825:8-19 (Bloch); RT 1700:25-1701:10

18   (Rubin). The proven facts that both the platform's initial adoption by handset makers and carriers

19   and its recent growth happened in the absence of rangeCheck are additional reasons why no

20   reasonable jury could link any of Android's profits to the temporary inclusion of those nine lines

21   in Android.

22   Oracle's lone piece of contrary evidence is that the rangeCheck method is allegedly called

23   2,600 times when powering on a smartphone or starting an emulator. Oracle Br. [Dkt. 1106] at

24   3:13-17 (citing RT 1329:5-21 (Mitchell)). This is vacuous. It is meaningless to cite an arbitrary

25   number of calls to a given method in the absence of context, and neither Dr. Mitchell nor any

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[1] Dr. Mitchell testified that "I found a number of other source code in other files that called that
26   function," RT 1329:13-14 (Mitchell), but the phrase "a number of other source code" is barely
27   intelligible. Dr. Mitchell never actually identified any Android file outside of TimSort that called
28   rangeCheck, or explained how that could be possible for a private method like rangeCheck.

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1   other witness testified whether rangeCheck was called any more or less than any other method in

2   the Android software, during the startup sequence or any other time. In the world of sophisticated

3   and ultrafast computer microprocessors, 2,600 calls to a function during the startup sequence of a

4   smartphone could be a *low* number relative to other functions. There is nothing in the record to

5   enable the Court or a jury to tell either way. Equally, just because a software function is called

6   frequently does not mean it is important; it would stand to reason that a trivial nine-line piece of

7   code that accomplishes a Programming 101 parameter test, like rangeCheck does, might be

8   invoked fairly frequently. Dr. Mitchell never opined that there is any correlation between the

9   number of calls to a function and its significance, much less that rangeCheck itself is significant.

10   He certainly did not say that rangeCheck offered a performance boost to Android—and Bloch,

11   who wrote it, made clear it does not.

       For all those reasons, even if Oracle had any evidence (and it doesn't) of Google revenue

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13   causally linked to the TimSort files, it would make no difference. Google has carried its burden

14   of proving that none of its Android profits are attributable to rangeCheck.

2. The trial record shows that the eight decompiled test files have no link to Android revenue.

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17   Oracle also seeks disgorgement of Android profits on the basis of the copying of eight test

files—files that were incorporated by Noser into Android code in contradiction to the express

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instructions of Google as set forth in the Noser-Google contract. RT 1696:21-1698:10, 1701:18-

19

21 (Rubin); RT 1798:17-1803:6, 1810:11-13 (Bornstein); TX 2765 at 11. Like with the TimSort

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files, Oracle can present no causal link between the eight test files and any Android revenue.

21

       As Oracle's expert conceded, the eight testing files do not appear on Android handsets.

22

RT 1318:20-1320:6 (Mitchell). In other words, there is no interaction whatsoever between users

23   of Android devices and the eight test files. Unsurprisingly, therefore, Oracle has proffered no

24   evidence, either at trial or in its expert reports, to support a finding that these eight files have any

25   causal effect on Android revenues generated by user activity on the handsets. *See* Third

26   Cockburn Report (Feb. 9, 2012) at 235-36, ¶ 645. In fact, these files were removed from current

27   releases of the Android platform more than a year ago to no moment. RT 1807:25-1810:1

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(Bornstein). Accordingly, Oracle cannot as a matter of law establish a right to any damages other than statutory damages for these eight test files.

C.   Oracle should be precluded from offering testimony about any alleged nexus between rangeCheck or the decompiled files and any Google revenue.

Not only is the argument that the copied files generated any Android revenue implausible, and not only does the evidence in the record already prove that those files had no impact on Android revenues, Oracle has no possible vehicle for offering any contrary evidence in a damages phase that could create a factual dispute on this issue.

As the Court knows, Oracle has always shot for the moon when it has come to damages in this case, choosing to offer evidence only of Google's gross revenue from the Android platform as a whole. Oracle's damages expert Dr. Iain Cockburn could have presented a gross revenue figure allegedly linked to rangeCheck or the test files in either his of his first two damages reports, but he never made the attempt. Instead, after ignoring copyright damages altogether in his first report, Dr. Cockburn's second and third reports offered an opinion only as to alleged gross revenue from all Android ad and applications sales. Second Cockburn Report (Sept. 15, 2011) at 186-88, ¶¶ 463-68, & Ex. 22 (presenting Android gross revenue calculation through 2011); Third Cockburn Report (Feb. 9, 2012) at 235-37, ¶¶ 643-49, & Ex. 22 (same). Indeed, based on Oracle's and Dr. Cockburn's deliberate choice to focus on Android revenues generally, the Court barred Oracle from offering any expert opinion on damages for any of Oracle's literal copying claims, including the claims for infringement of rangeCheck and the test files:

> Dr. Cockburn has not adequately valued that [allegedly copied] code in his report and cannot do so at trial. This order holds that the jury will be instructed that if Google is found not liable for infringing the selection, arrangement, and structure of the API packages, then Dr. Cockburn's copyright damages analysis is inapplicable.

Jan. 9, 2012 Order [Dkt. 685] at 10. Oracle chose to maximize its potential damages recovery by focusing on the structure, sequence, and organization of the Java API packages and using the alleged literal copying as window dressing. Oracle's counsel conceded, as he had to, that Oracle cannot offer expert testimony to sustain its burden of proving Google's revenue causally linked to the infringement. RT 3788:25-3789:1 (Boies).

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1   Neither does Oracle have any fact witness on its witness list who could offer evidence of a

2   causal link between Android revenues and the rangeCheck method, the two Android files

3   containing that method, the API package containing those files, or the Android core libraries, the

4   eight test files, or any other possibly divisible component of the Android platform. In fact, not

5   only did Oracle prepare no expert and disclose no fact witness on this subject, it ***never disclosed***

6   ***the underlying damages theory*** at any time during discovery.

7   Oracle first disclosed its damages theory, as Rule 26(a) requires, in its December 2, 2010

8   initial disclosures. There, Oracle did not refer to the rangeCheck method or the decompiled files

9   at all. Indeed, the only fact Oracle disclosed relating to damages at all was that Eric Schmidt had

10   said Android's revenues were "large enough to pay for all of the Android activities and a whole

11   bunch more." *See* Zimmer Decl. Ex. A (Oracle's 12/2/10 Disclosures) at 7:6-7. Oracle also

12   noted that it had not completed its damages calculation, because "it will require expert evaluation

13   of information in Google's possession." *Id.* at 6:10-11. Oracle twice supplemented this response,

14   but neither supplemental response referred to the rangeCheck method or the decompiled files,

15   much less stated any facts suggesting a causal link between that material and any Android

16   revenue. *See* Zimmer Decl. Ex. B (Oracle's 6/3/11 Disclosures), Ex. C (Oracle's 8/10/11

17   Disclosures). Both supplemental responses referenced Oracle's damages expert's reports—

18   which, as noted above, omitted any discussion of literal copying damages. *See* Zimmer Decl.

19   Exs. B, C.

20   Oracle's failure to disclose any evidence supporting this theory continued throughout the

21   discovery period. On January 6, 2011, Oracle answered Google's first set of interrogatories,

22   including Google's Interrogatory No. 1, which asked for a detailed statement of "Oracle's factual

23   bases for each allegation of damage or harm that Oracle claims to have suffered as a result of any

24   act or omission of Google." Zimmer Decl. Ex. D (Oracle's 1/6/11 'Rog Responses) at 1:7-8.

25   With regard to its "claim for recovery of Google's profits attributable to the infringement," Oracle

26   disclosed various facts about Google's revenues and business model, but stated no facts tying

27   those revenues to rangeCheck or the eight decompiled files. *Id.* at 3:5-4:8. Oracle also noted that

28   it would provide further information about its claimed damages, including about "disgorgement

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1   of Google's profits from the infringement," when it served its damages expert's report. *Id.* at

2   5:24-6:4. Oracle twice supplemented this response, but neither supplemental response disclosed

3   any facts related to the rangeCheck method or the decompiled files. *See* Zimmer Decl. Ex. E

4   (Oracle's 4/25/11 Supp. 'Rog Responses) at 5:11-6:16; Zimmer Decl. Ex F (Oracle's 7/29/11

5   Supp. 'Rog Responses) at 6:1-18.

6   In short, Oracle has never disclosed any intent to rely on testimony from any fact witness

7   to establish a nexus between Google's infringement and its Android-related revenues. Instead,

8   Oracle has always taken the position that it would rely on expert testimony to connect the dots

9   between any alleged infringement and Google's revenues, but, as already noted several times, Dr.

10   Cockburn never connected those dots and eventually the Court ruled he was forbidden from

11   trying. Dr. Cockburn only ever opined that Google's Android-related revenues are causally

12   linked to Google's use of the structure, sequence, and organization of 37 API packages in the

13   J2SE platform, material Google was not found liable for infringing. Third Cockburn Report (Feb.

14   9, 2012) at 227-37, ¶¶ 624-649.

15   None of this is surprising, because Oracle came up with its current disgorgement theory

16   only days ago, when the jury failed to return a liability verdict on the SSO. While the jury was

17   deliberating on its copyright claims, Oracle conceded it had no remedy for any of its literal

18   copying claims besides statutory damages. RT 2775:25-2776:1 (Mr. Boies: "[T]hat, I believe,

19   would only be statutory damages on [Verdict Form Question] 3"). It was only on this Monday,

20   after the jury delivered its partial verdict on copyright issues, that Oracle announced it might seek

21   disgorgement of Google's profits based on its literal copying claims.

22   Oracle is long since out of time. Oracle repeatedly failed to disclose a factual basis for its

23   disgorgement remedy on the copied files, and has never disclosed any witness on that subject. It

24   is unclear what evidence Oracle possibly could offer of a causal link, but it would be deeply

25   unfair to allow Oracle to spring that surprise on Google now, at the very end of trial.

26   **III.   CONCLUSION**

27   For all the foregoing reasons, this Court should not conduct a trial on Oracle's entitlement

28   to disgorgement of profits for Google's infringement of the nine-line rangeCheck method and the

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1   eight test files. The Court should grant summary judgment for Google on that issue.

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3   Dated: May 12, 2012   KEKER & VAN NEST LLP

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                                                        /s/ Robert A. Van Nest
5   By: ROBERT A. VAN NEST

6   Attorneys for Defendant
                                                 GOOGLE INC.
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